

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of	)	
	)	
JAMES A. KAY, JR.	)	File No. 0000415304
	)	
Application for Modification of and for	)	
Consent to the Assignment of the License for	)	
Business Radio Service Station WIK902	)	

**ORDER**

**Adopted: February 3, 2003**

**Released: February 11, 2003**

By the Commission:

1. *Introduction.* We have before us an Application for Review (AFR) filed by James A. Kay, Jr. (Kay) on May 1, 2002.<sup>1</sup> The AFR seeks review of the denial of Kay's Petition for Reconsideration filed January 2, 2001 by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division).<sup>2</sup> The Division affirmed the decision of its Licensing and Technical Analysis Branch (Branch), which dismissed an application seeking to assign and modify Station WIK902, Los Angeles, California, from Francisco Padilla (Padilla) to Kay.<sup>3</sup> For the reasons discussed herein, we deny the AFR.

2. *Background.* On June 13, 1991, the Commission authorized Padilla to operate Station WIK902.<sup>4</sup> On April 11, 1994, Padilla filed an application seeking to assign the license for Station WIK902 to Kay. Concurrently with the Padilla assignment application, Kay sought to modify the license of station WIK902. The license for Station WIK902 was scheduled to expire by its terms on June 13, 1996. On June 13, 1996, the assignment and modification applications were still pending; however, no renewal application for Station WIK902 was filed on or before that date. As a result, the license for Station WIK902 expired.

3. On December 4, 2000, a computer generated dismissal letter was sent to Kay via the Commission's Universal Licensing System (ULS).<sup>5</sup> The letter noted that "[t]he license for which this application has been filed has recently expired."<sup>6</sup>

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<sup>1</sup> James A. Kay, Jr. Application for Review (filed May 1, 2002) (AFR).

<sup>2</sup> James A. Kay, Jr. Petition for Reconsideration (filed January 2, 2001) (Petition). Kay subsequently filed a supplement to the Petition. James A. Kay, Jr. Supplement to Petition for Reconsideration (filed January 3, 2001).

<sup>3</sup> Applications of James A. Kay, Jr., For Modification of Stations WNQK532, WIJ992, WIJ893, and WII621 and Assignment of Station WIK902, *Memorandum Opinion and Order*, 17 FCC Rcd 5951 (WTB PSPWD 2002) (*Regents MO&O*). This *MO&O* was adopted on March 29, 2002, and released on April 1, 2002.

<sup>4</sup> Station WIK902 was authorized to provide service on frequencies 471.6375 MHz and 474.6375 MHz.

<sup>5</sup> This uncharacteristic delay in acting on the application was due to the fact that Kay was the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee. *See, e.g., Connex Freight, Order*

4. On January 2, 2001, Kay filed a Petition for Reconsideration of the Branch's dismissal of the above-captioned application.<sup>7</sup> On April 1, 2002, the Division denied Kay's Petition for Reconsideration as to Station WIK902.<sup>8</sup> The Division affirmed the Branch's dismissal of the subject application because the underlying authorization for Station WIK902 was not timely renewed, and found Kay's additional claims without merit.<sup>9</sup> On May 21, 2002, Kay filed the subject AFR.

5. *Discussion.* We note, as an initial matter, that it is axiomatic that an expired license cannot be assigned.<sup>10</sup> While the subject application was pending, Padilla failed to file a timely renewal application for Station WIK902. Thus, the license for Station WIK902 expired. With the expiration of the license, there was no longer a basis for the subject application. There was nothing for Padilla to assign to Kay, and therefore nothing for Kay to modify. Thus, we affirm both the Branch and the Division in their respective decision to dismiss the subject application.

6. In his AFR, Kay submits that Commission review is warranted in accordance with Section 1.115(b)(2)(ii) of the Commission's Rules,<sup>11</sup> by reasserting that the subject application should be deemed an "application for a renewal or a new license" within the meaning of Section 9(b) of the Administrative Procedure Act (APA), which bars the expiration of such license until the status of the application is finally determined.<sup>12</sup> Moreover, Kay reasserts that absent the processing delay, the application should have been granted long before the scheduled expiration of the underlying authorization.<sup>13</sup>

7. We agree with the Division's disposition of this issue. In the *Regents MO&O*, the Division concluded that the subject application was neither for a renewal of a license nor for a new license as

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on *Reconsideration*, 15 FCC Rcd 13345, 13345 ¶ 2 (WTB PSPWD 2000). Under current procedures, uncontested assignment applications ordinarily are processed within thirty to forty-five days.

<sup>6</sup> See Automated Dismissal Letter (FCC Form 699) to James A. Kay, Jr. for FCC File No. 415304 (dated December 4, 2000). We note that this type of dismissal is automatically and routinely generated when ULS detects pending applications where the underlying license is no longer valid.

<sup>7</sup> See Petition.

<sup>8</sup> See *Regents MO&O*, 17 FCC Rcd at 5952-54 ¶¶ 7-11.

<sup>9</sup> Specifically, the Division determined that (a) Kay's application was not a new application, but an assignment application, which was outside of the scope of the provisions of Section 9(b) of the Administrative Procedure Act; (b) the subject license expired on its terms because a timely renewal application was not filed; and (c) Kay's claims of Commission misrepresentation and lack of candor were without merit. See *id.* at 5953-54 ¶¶ 8-11.

<sup>10</sup> See *Applications of Transit Mix Concrete and Material Company; For Assignment of License for Station WNQJ776, Huntsville, Texas; Request for Renewal of License for Station WNQJ776, Huntsville, Texas, Memorandum Opinion and Order*, 16 FCC Rcd 15,005 ¶ 2 (2001).

<sup>11</sup> 47 C.F.R. §1.115 (b)(2)(ii) states one of the prongs for Commission consideration of an application for review -- that "[t]he action involves a question of law or policy which has not previously been resolved by the Commission."

<sup>12</sup> See AFR at 1 citing 5 U.S.C. § 558(c).

<sup>13</sup> AFR at 2.

contemplated by the APA.<sup>14</sup> The application that was submitted sought only to assign and modify the license for Station WIK902. We find no merit in Kay's assertion that the information happened to be submitted on a different form, placing form over substance. Procedures and specific applications are in place for specific functions. Specifically, in the *Regents MO&O*, the Division concluded that Kay's unsupported assertion that the assignment application should have been considered a new facilities application was of no merit and that "by its very terms, the application sought the assignment of an existing license, as opposed to a license for a new station."<sup>15</sup> As such, the Division correctly determined that Section 9(b) of the APA – which refers to renewal and new applications and not assignment applications – does not apply here.<sup>16</sup> Moreover, it has been previously found that a license which expires by its own terms is not protected under Section 9(b) of the APA.<sup>17</sup> Thus, Padilla's license is afforded no review under the APA's terms.<sup>18</sup>

8. *Conclusion.* Thus, for the reasons discussed above, we conclude that the Division's denial on April 1, 2002, of the Kay Petition, filed on January 2, 2001, was correct and should be affirmed. As such, Kay's Application for Review, filed May 1, 2002, is denied.

9. *Ordering Clause.* Accordingly, **IT IS ORDERED** that, pursuant to the authority of Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, James A. Kay, Jr.'s Application for Review, filed May 1, 2002, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>14</sup> See *Regents MO&O*, 17 FCC Rcd at 5953 ¶ 9.

<sup>15</sup> See *id.*

<sup>16</sup> 5 U.S.C. § 558(b).

<sup>17</sup> See, e.g., *Atlantic Richfield Co. v. United States*, 774 F.2d 1193 (D.C. Cir. 1985).

<sup>18</sup> Finally, Bureau delay on Kay's modification/assignment application does not obviate the requirement of due diligence on the part of the underlying licensee of Station WIK902, which included filing a timely renewal application.